No. 14,563

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG BING NUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

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ARGUMENT.

1. THE TOMPLAIN CASE IS WHOLLY BESIDE THE POINT AT ISSUE.

The Acts whence Section 545, 18 U.S.C.A. is derived are Section 593(a) (Smuggling) and Section 593(b) (Importation and bringing into the United States certain merchandise contrary to law) Tariff Act of 1922. These sections became Section 1593, 19 U.S.C.A., repealed June 25, 1948 (1953 Cumulative Part Page 205, Title 19 U.S.C.A.) and became Section 545, 18 U.S.C.A. in two sentences, separated by the word "or".

Gillespie v. U. S., 13 Fed. 2d 736, 737.

The statute in the second sentence charges an altogether different offense from that defined in the first sentence.

Briefs on both sides are in agreement that the indictment is laid under the first sentence of Section 545, namely, Smuggling and the record is very clear on this point. (Rep. Tr. 35, 36.) On page 35, line 4 the following occurred:

> "The Court. Now, counsel, would you state, in the light of the issues, the particular section under which you are proceeding?
>
> Mr. Riordan. Yes, your Honor. The indictment, your Honor, is couched in the terms of the first sentence of the statute."

U. S. v. Keck, 172 U.S. 434, 43 L.Ed. 505; Appellant's Opening Brief page 7.

In the *Tomplain* case the violation was laid under Section 593(b), Tariff Act of 1922. The indictment alleged an unlawful importation or bringing into the United States contrary to law of certain merchandise.

The charge was not brought under Section 593(a) namely, Smuggling, now the first sentence of Section 545, 18 U.S.C.A., the predicate of this prosecution.

The *Tomplain* case cites *Cunard v. Mellon,* 262 U.S. 100, 67 L.Ed. 894 and quotes from that case,

> "Entry through a custom house is not of the essence of the act."

It deals with the impact of Prohibition Laws upon the importation of liquor. Nothing in the case is referable to smuggling.

In the *Gillespie* case supra, the illicit liquor was actally landed in a lumber yard. The charge was laid under Section 593(b). The Court said (page 737):

> "The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to '*bring into* the United States.' (Emphasis supplied by the Court.)
>
> "It is in section 593(a) that punishment is prescribed for one who 'smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,' etc."
>
> * * * * * * *
>
> "* * * while it may be admitted that bringing into the United States merchandise contrary to law is not necessarily smuggling, it is undoubtedly true that all goods smuggled and clandestinely introduced into the United States are necessarily brought into that country contrary to law."
>
> "Smuggling is a word to be interpreted by reference to Keck v. U.S., * * * a case decided upon unusual consideration."
>
> * * * * * * *
>
> "* * * it is clear that it was intended to charge the offense created by section 593(b), and not that created by section 593(a)."

In *The J. Duffy,* 18 Fed. 2d 754 where intoxicating liquors were found on a schooner in Long Island Sound, the Court said (page 755):

> "* * * if this cargo was on board a vessel in the territorial waters, it was contrary to law under the section of the Tariff Act above quoted, for we hold it was an unlawful bringing into the country."
>
> * * * * * * *

> "In the case of Keck v. United States, supra, referred to below, was a transaction involving smuggling. The decision holds that a case of smuggling is not effected until the goods have gone beyond the customs, and that such line is not passed by goods at sea when they pass the three-mile limit and have not yet been landed."

It is crystal clear therefore that the *Tomplain* case is utterly irrelevant to the issue at bar, and that the offense of unlawful importation and bringing into the United States, is dealt with in that case and the crime of smuggling is distinct. When the Government says in its brief (page 5):

> "The authorities hold that goods are imported or brought into the United States when they enter the waters of the United States."

it cannot refer to smuggling, and that language is directly contrary to the above quoted Duffy statement.

See also:

Tomplain v. U. S., 42 Fed. 2d 205 at 206;

U. S. v. McGill, 28 Fed. 2d 572 (Ninth Circuit)

is a complete answer to the argument of the Government.

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2. APPELLANT EXPLAINED HIS POSSESSION OF THE MERCHANDISE FULLY.

Since we contend that there is not a scintilla of evidence to prove smuggling the matter of explanation of possession is wholly immaterial but if it were

material Dong, agent of appellant, who went to Marshall the customs man with his foolish suggestion, told him all about the merchandise, who it belonged to and that if it could not be landed the merchandise would be taken back to Manila. (Rep. Tr. 76, 77.) Dong told Marshall where the merchandise was located. (Rep. Tr. 84, line 23, 85, line 8.) It appears therefore that there was nothing concealed and Dong told the customs officials all about it. What more could he have said or what further explanation is necessary?

What we have said in our opening brief and hereinabove in this closing brief is sufficient answer with reference to the point made by the Government that the evidence supports the findings. Our contention is that none of the cases cited by the Government touch upon smuggling and that under *Keck* and other cases in our opening brief the crime of smuggling did not occur. Therefore, it must be apparent that the findings of the Court in the written memorandum (Vol. 1, T. 8) with reference to the intention of the defendant to defraud the Government and that he sought to move the property by *clandestine means* find absolutely no support in the evidence. There can be nothing clandestine in the movement of merchandise when a full and complete disclosure concerning the movement and the whereabouts of the merchandise is made to the interested customs officials. The word clandestine imports secrecy. There was nothing clandestine in anything the defendant did. (Appellant's Brief pages 6 to 10.)

The Government in its brief stresses (page 6) that defendant signed the quoted statement from the declaration. Whether that statement be material or not, the fact is that it is undisputed that defendant could not read or write. (Rep. Tr. 80.)

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3. THE GOVERNMENT IS SILENT ON THE DUTY OF A CREW MEMBER.

We invite attention to the fact that point 3, page 11 to page 15 of our brief with reference to Customs Regulations defining the duty of a crew member is utterly without reply in the Government's brief.

CONCLUSION.

The Government states that appellant has intimated that the honorable trial judge engaged in racial discrimination. Nothing could be further from the fact. A casual reading of what was said indicates that the reference was to the customs officials, the police, not to the judiciary. There is absolutely no claim or implication of prejudicial misconduct of the Court. We stand on the statement. If one again reads the testimony of Kahler as he wrestled with his conscience the conclusion is justified that with such attitudes, no one has a Chinaman's chance.

We respectfully submit that this is a case of smuggling not of importation and the judgment should be reversed.

Dated, San Francisco, California,
January 10, 1955.

Respectfully submitted,
G. C. RINGOLE,
Attorney for Appellant.